No. 87-1835 and 87-1836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION,

Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION, *et al.*,

Respondents.

CALIFORNIA PUBLIC UTILITIES COMMISSION,

Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION, *et al.*,

Respondents.

BRIEF *AMICI CURIAE* OF CALIFORNIA UTILITIES IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Department of Water and Power of the City of Los Angeles, the Public Service Department of the City of Burbank, the Public Service Department of the City of Glendale, the Water and Power Department of the City of Pasadena, Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company (herein-

after collectively referred to as the "California Utilities") submit this brief *amici curiae* in support of the petitions for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit. Consents to the filing of the brief have been obtained from all parties and have been filed with the Clerk.

INTEREST OF THE CALIFORNIA UTILITIES

The California Utilities are investor- and municipally-owned electric utilities serving a population of approximately 25 million electric consumers in the State of California. Since 1969, when the first extra-high voltage "Intertie" transmission lines between California and the Pacific Northwest were energized, the California Utilities have purchased substantial quantities of capacity and energy from Bonneville Power Administration ("BPA"), a Federal power marketing agency, and from Pacific Northwest and Canadian electric utilities. In 1985 alone, the California Utilities purchased approximately $400 million of capacity and energy from BPA, with Pacific Gas & Electric Company, Southern California Edison Company, and the Los Angeles Department of Water and Power as BPA's first, second, and eighth largest customers that year, respectively. All of these sales by BPA to California and the majority of sales to California by other Pacific Northwest electric utilities were delivered over Pacific Intertie transmission facilities governed by BPA's Intertie Access Policy, the subject of the proceeding below. To the extent BPA continues to be successful in using the horizontal market allocation scheme and other anticompetitive provisions of its Intertie Access Policy artificially to

maintain or increase the prices charged California, the California Utilities and their ratepayers will be directly and adversely affected.

In addition, the California Utilities are involved in the construction and planning of new or expanded transmission facilities between the two regions. The continued application of BPA's restrictive Intertie Access Policy is likely to have an adverse impact on the economic viability of these projects and thereby on the interstate commerce in electric capacity and energy in the Western United States and Canada.

For these reasons, and as discussed in more detail below, the California Utilities and their millions of ratepayers have a direct and substantial interest in the outcome of this case.

REASONS FOR GRANTING THE WRIT

The California Utilities fully concur in the arguments presented by the California Energy Resources Conservation and Development Commission in No. 87-1835, and the California Public Utilities Commission in No. 87-1836, for granting a writ of certiorari to review the judgment and opinion of the Ninth Circuit. The California Utilities submit this brief to direct the Court's attention to the significant and adverse impacts of BPA's Intertie Access Policy, upheld by the decision below, on the California Utilities and their ratepayers.

Of all the problems currently faced by the suppliers and consumers of electricity in the State of California, few are more important than the one that underlies the question presented in this case. While the problem is unique to the Pacific Northwest and Southwest

areas, and therefore can arise in only one circuit, the amounts of money involved and the number of people affected are so large that the issue is too important not to be decided by this Court.

BPA, a federal agency acting in a proprietary capacity, has created an Intertie Access Policy that severely distorts the market for bulk electric power in the Western United States and Canada for the economic benefit of the Pacific Northwest region and to the detriment of the Pacific Southwest, especially California. As Judge Norris stated in his dissent below, it is "a scheme which if implemented by a private party would plainly violate the antitrust laws." App. at A26[1], 831 F.2d at 1479. Even the majority below acknowledged the anticompetitive nature of the Access Policy:

> The result [of the Access Policy's formula allocation] is a regularly shifting, horizontal division of the market for surplus nonfirm energy; each eligible producer is temporarily granted sole access to a specified share of the capacity, which it may either use or allow to remain unused without fear of competition by other producers.

App. at A16, 831 F.2d at 1475. The result of BPA's anticompetitive Policy has been to charge the California Utilities and their ratepayers hundreds of millions of dollars more than they would have been charged without the horizontal market allocation and other market restrictions imposed by BPA.

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[1] References to "App." are to the Appendix submitted by the Petitioners in Nos. 87-1835 and 87-1836.

The anticompetitive impact of BPA's Intertie Access Policy will continue and perhaps increase absent review by this Court. BPA recently has attempted to establish "market-based" (*i.e.*, whatever the market will bear) pricing for transmission and power services to the California market. Thus, BPA seeks to obtain market prices for its services while it controls that market by restricting the access of low-cost producers of electricity to its surplus interregional transmission facilities, for the express purpose of increasing and maintaining price levels on sales to California.

Finally, BPA's Intertie Access Policy distorts not only the operation of the bulk power market in the Western United States, but also its structure. BPA's Policy makes it less likely that additional interregional transmission facilities will be built, thereby reducing commerce in electric capacity and energy between the two regions and foregoing benefits to both regions from otherwise economic transactions.

A. BPA's ANTICOMPETITIVE ACCESS POLICY HAS COST CALIFORNIA ELECTRIC CONSUMERS HUNDREDS OF MILLIONS OF DOLLARS IN EXCESSIVE CHARGES FOR ELECTRIC POWER.

The petitions of the California Commissions provide considerable detail concerning the Pacific Intertie, BPA's Intertie Access Policy, and the bulk power market in the Western United States and Canada.[2] Briefly, California is the major market for bulk electric power suppliers in the West. Pacific Northwest

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[2] *See also* the decision below, App. A, 831 F.2d 1467; *Department of Water and Power of the City of Los Angeles v. Bonneville Power Administration*, App. B, 759 F.2d 684 (9th Cir. 1985).

and Canadian power producers, and especially BPA, have a natural, competitive advantage in that market due to their vast, low-operating-cost hydroelectric resources, which can be used to displace more expensive oil- and natural gas-fired generation in California. This advantage is especially pronounced during periods of relatively high oil and natural gas prices.

The delivery to California of power from the Pacific Northwest and Canada takes place over the Pacific Intertie, a system of extra-high voltage transmission lines connecting the Pacific Northwest and California. The northern portion of the Intertie is owned principally by BPA. Prior to September 1984, BPA generally allowed access to all, including Canadian utilities, on a first-come, first-served basis to surplus capacity on BPA's portion of the Intertie. Because the Intertie has a finite capacity and because the Pacific Northwest and Canada at times have heavy streamflows that result in substantial quantities of hydroelectric energy being available, the supply of power sometimes exceeded the effective demand, *i.e.*, the capacity of the Intertie. The natural, competitive effect was to reduce the price BPA and others could obtain for the power at those times.

In an effort to increase and maintain prices to California at higher levels,[3] BPA in 1984 instituted its

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[3] App. at E4-E5 (Intertie Access Policy seen as solution for power glut in Pacific Northwest that reduced prices for power sold over the Intertie); App. at E79 ("The Near Term Intertie Access Policy increases the market power of Pacific Northwest sellers relative to that of California buyers. . . . This may result in higher prices for economy energy purchased from Pacific Northwest sellers."); *see* App. at F1-F2 (experience under first six months of Intertie Access Policy indicated increased sales and revenues to BPA and Pacific Northwest utilities).

Intertie Access Policy, which among other things includes a horizontal market allocation scheme for spot market sales to the California market over the Intertie. The scheme prefers Northwest power suppliers over all others and also protects those Northwest suppliers from competition among themselves by horizontally dividing access to the Intertie among them. BPA allocates to itself and Pacific Northwest generating utilities fixed hourly shares of its Intertie capacity in proportion to the amount of energy each declares available each hour. Nonregional sellers, such as those in Canada, are denied access to the California spot market much of the time and, during the limited times they are allowed access, obtain it only after all Pacific Northwest sellers' demands for access have been satisfied.

By allocating fixed shares of its Intertie capacity, BPA ensures that its goal of increasing and maintaining prices to California will be met. No utility can resort to price competition to increase its market share, because no additional Intertie capacity can be obtained, even if another utility's allotted capacity goes unused. As Judge Norris aptly observed in his dissent, the scheme "restricts price competition among Northwest utilities and denies Southwest utilities and energy consumers the benefit of free market pricing for surplus energy" by creating "a cartel for the Northwest utility companies in the sale of power to the Southwest." App. at A26, 831 F.2d at 1479. Despite its intended effect on prices paid by California, BPA did not submit its Policy to the ratemaking process established by statute.[4]

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[4] Pacific Northwest Electric Power Planning and Conservation

BPA's Intertie Access Policy had its intended effect. By eliminating price competition among the low-cost Pacific Northwest power suppliers in the West Coast bulk power market and by eliminating Canadian

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Act of 1980, §7, 16 U.S.C. §839e. In its decision below, the Ninth Circuit rejected the contention that BPA's action in implementing its Intertie Access Policy constituted ratemaking subject to review by the Federal Energy Regulatory Commission. The Ninth Circuit concluded that the Policy did not constitute ratemaking because it altered neither BPA rates or prices, nor the availability provisions of BPA rate schedules. App. at A11-A12, 831 F.2d at 1473.

The court was wrong on both counts. Although BPA did not change its *rates* for nonfirm energy, it did change the effective *price* charged California customers for such energy by eliminating competitive forces in the Pacific Northwest that had kept prices under BPA's flexible rate schedule relatively low at certain times. The Ninth Circuit held in an earlier case that BPA actions that lower the price paid for BPA energy constitute ratemaking even if the rate schedule itself remains unchanged. *California Energy Resources Conservation & Development Commission v. Bonneville Power Administration.*, 754 F.2d 1470, 1474 (9th Cir. 1984), *cert. denied*, 474 U.S. 1005 (1985).

The Ninth Circuit's conclusion that availability provisions had not been changed was similarly flawed. For example, BPA's 1983 transmission rate schedules, in effect at the time the Intertie Access Policy was implemented, stated that BPA transmission was available on a fair and non-discriminatory basis to all utilities. BPA 1983 Transmission Rate Adjustment, 48 Fed. Reg. 12,766, 12,772 (March 28, 1983) ("Any capacity in the [Federal Columbia River Transmission System] which BPA determines to be in excess of the capacity required to transmit Federal power will be made available to all utilities on a fair and nondiscriminatory basis. . . ."). The Intertie Access Policy altered this general availability of BPA's transmission by excluding nonregional utilities from the Intertie much of the time.

The petition in No. 87-1836 seeks review of these errors. Petition of California Public Utilities Commission at 8-11.

suppliers entirely when they would otherwise compete, BPA established a price floor on sales to California, set just below the price of alternative power supplies available to California from indigenous generation or from non-Pacific Northwest suppliers—generally higher priced, fossil-fuel generation. In effect, BPA eliminated the market incentives for low-cost suppliers to increase sales to California by lowering their prices.

Table 1 graphically shows the effect of BPA's Intertie Access Policy on price levels for spot energy sales to California.[5] BPA's Intertie Access Policy caused prices to double. These artificially high prices were maintained until decreases in oil and natural gas prices in early 1986 introduced to the market low-cost supplies of power that were not subject to BPA's Intertie Access Policy control mechanism. Even then, prices charged by BPA and Pacific Northwest utilities were often at artificially inflated levels. The marginal cost of producing an additional kilowatthour of energy on a hydroelectric system is extremely low, on the order of a few mills. During high water conditions in the Pacific Northwest, when BPA and Pacific Northwest utilities do not have the option of storing water in their reservoirs rather than using it to generate

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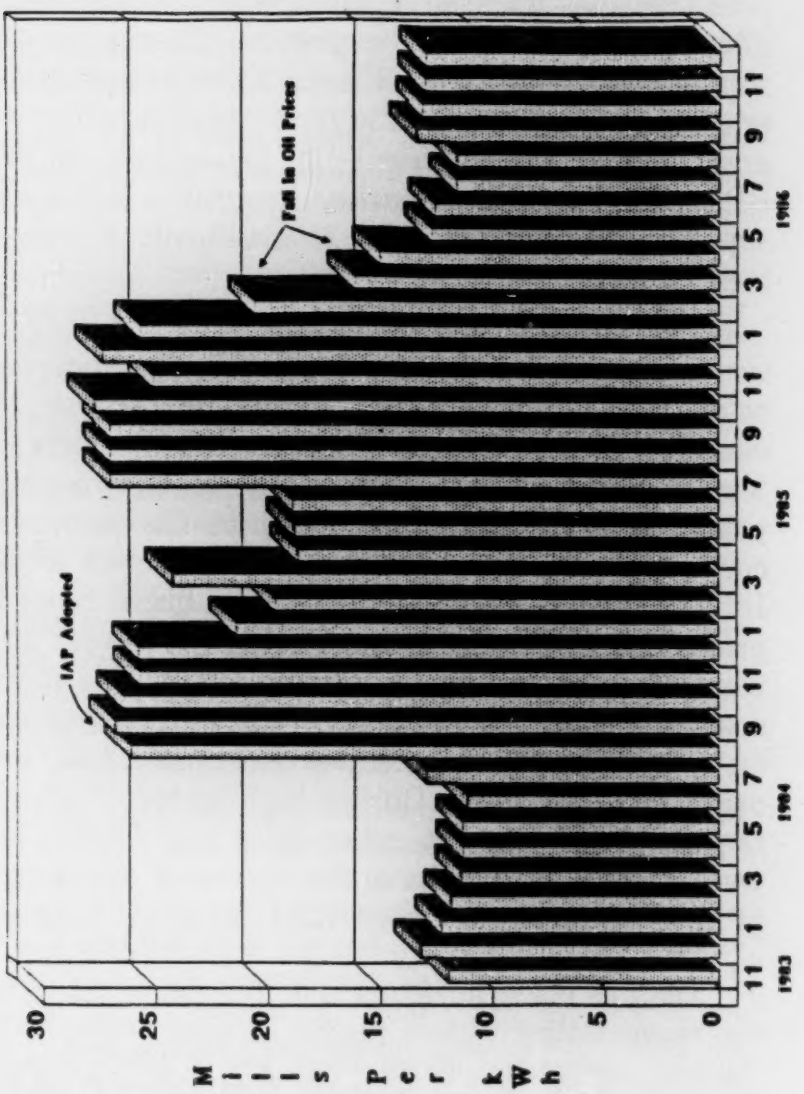
[5] Although the table reflects only BPA prices, the prices are also representative of those charged by other Pacific Northwest suppliers. Before the Access Policy was in effect, competition among Pacific Northwest suppliers, including BPA, kept prices at or near a market equilibrium level. Following implementation of the Access Policy, there was no reason for Pacific Northwest suppliers to reduce their price below the higher level established by BPA, since the fixed allocation procedure of the Policy prevented them from increasing their share of the market no matter how low they reduced their price.

TABLE 1

BPA SPOT MARKET ENERGY PRICES TO CALIFORNIA

(November 1983 - December 1986)



Source: *Intertie Access Policy of the Bonneville Power Administration: Oversight Hearing Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs*, 100th Cong., 1st Sess. 623 (1987)

energy, competition would normally result in prices approaching marginal costs. As shown on Table 1, prices did not drop to such levels, but rather to levels just below the price of the reduced-cost, oil- and natural gas-fired alternatives available to California. Thus, even when oil and natural gas prices are low, California consumers pay a surcharge margin on their purchases from Pacific Northwest suppliers that results solely from BPA's Intertie Access Policy. Moreover, whatever price relief has been obtained through the low oil and natural gas prices will last only as long as those prices remain low. When oil and natural gas prices rise, the price of BPA and Pacific Northwest energy for sale to California will march in step upward, protected from intraregional price competition by BPA's Intertie Access Policy.

It is difficult to be precise in estimating the aggregate dollar impact of the Intertie Access Policy on prices to California; several variables, such as water conditions, demands for power in California and the Pacific Northwest, and available Intertie capacity also have an impact on price and purchases. However, a February 1988 study by Decision Focus Incorporated for Pacific Gas & Electric Company analyzed the effect of BPA's Intertie Access Policy on prices to California, adjusting for such variables.[6] The study concluded that the Access Policy resulted in cartel pricing by BPA and Pacific Northwest utilities for spot market energy sold to California, with prices approximately 8 mills per kilowatthour greater during the period between late 1984 and mid 1987 than they

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[6] Decision Focus Incorporated, *An Economic Analysis of Bonneville Power Administration's Intertie Access Policy* (February, 1988) (unpublished report).

would have been absent the Intertie Access Policy. Applying this margin to the approximately 11 million megawatthours of 1985 spot market purchases by the California Utilities from BPA alone results in a figure of $88 million in excessive payments by *amici* to BPA *in one year* as the direct result of the anticompetitive effect of the Access Policy. Moreover, because BPA typically represents roughly two-thirds of the Pacific Northwest energy sales to California, the total effect of BPA's elimination of competition within the Pacific Northwest on charges to the California Utilities in 1985 was probably fifty percent greater, or $132 million. The overcharges to all California consumers, including those not participating as *amici* here, would be even greater. It is therefore apparent that BPA's Intertie Access Policy has already cost California electric consumers hundreds of millions of dollars in charges resulting solely and intentionally from conduct "which if implemented by a private party would plainly violate the antitrust laws". App. at A26, 831 F.2d at 1479 (Norris, J., dissenting). Unless the Policy is reviewed by this Court and reversed, this injury to California electric consumers will continue.

B. THE ADVERSE IMPACT OF BPA's INTERTIE ACCESS POLICY ON CALIFORNIA IS LIKELY TO INCREASE.

As noted above, and as shown on Table 1, the price-fixing margin BPA and other Pacific Northwest suppliers are able to obtain from California due to the Access Policy's cartel pricing scheme depends in part on oil and natural gas prices. If these prices are relatively low, the California Utilities can run their own generation or purchase from non-Pacific Northwest suppliers, thereby forcing BPA and other Pacific

Northwest suppliers to reduce somewhat their margin. However, the last two decades have demonstrated the potential upward volatility of oil and natural gas prices. Should these prices again escalate, BPA's Intertie Access Policy will enable Pacific Northwest suppliers to increase the prices charged for their low-cost hydroelectric generation to even higher levels.[7]

BPA has set the stage to take even greater benefit from such future increases in oil and natural gas prices. In the past, BPA has generally tied its rates

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[7] On May 17, 1988, BPA issued a Long Term Intertie Access Policy, 53 Fed. Reg. 24,483 (June 29, 1988), which supersedes the Near Term Intertie Access Policy litigated below. The Long Term Policy is functionally indistinguishable from the previous Policy, except that BPA has proposed an "experiment" under which some competition will be permitted at certain periods. The experiment is subject to BPA's control and discretion. BPA will design the experiment, decide when it will begin, and judge the outcome based on its views of whether a competitive market exists on the West Coast. As discussed in detail in the petitions of the California Commissions, BPA, a proprietary agency with Pacific Northwest, not national, interests in mind, is particularly unsuited to the task of judging the competitiveness of that market.

Most importantly, the "experiment" is just that—an experiment. If BPA determines, in its sole discretion, that the "experiment" is unsuccessful, it will return to the stated allocation provisions of the Long Term Interie Access Policy—provisions identical to those at issue here. For this reason, it would be inappropriate to defer review of the critical issues raised here simply because BPA has issued a revised policy that, except for a temporary, experimental variance, is identical to the Policy under consideration. To the contrary, delayed review could result in additional hundreds of millions of dollars in excessive charges to California consumers.

in some way to its costs. Recently, however, BPA has established upwardly flexible rates for sales to California, under which BPA can adjust prices above its costs if market conditions permit.[8] The Federal Energy Regulatory Commission recently rejected one of these rates, precisely because it permitted BPA to charge market-based prices in a market BPA controls through the Intertie Access Policy.[9] BPA responded by restructuring the rate so as to avoid FERC review of the market in which the rate operates. BPA 1988 Proposed Modification of Rate Schedule SL-87, 53 Fed. Reg. 25,531 (July 7, 1988).[10] Absent review

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[8] *See* BPA 1985 Proposed Wholesale Power Rate Adjustment, 49 Fed. Reg. 35,177, 35,191-93 (Sept. 6, 1984) (discussion of NF-85 Nonfirm Energy rate); BPA 1987 Proposed Wholesale Power Rate Adjustment, 51 Fed. Reg. 47,108, 47,120-22, 47,124-25 (Dec. 30, 1986) (discussion of SL-87 Long-Term Surplus Firm Power, SP-87 Surplus Firm Power, and NF-87 Nonfirm Energy rates).

[9] "SL-87 amounts to a flexible pricing scheme. Typically, pricing flexibility should only be allowed in a competitive market or where the seller does not possess significant market power. We do not believe that BPA has demonstrated satisfactorily that either of these conditions exist." *United States Department of Energy—Bonneville Power Administration*, 43 Fed. Energy Reg. Comm'n Rep. (CCH) ¶61,032 at 61,086 (1988).

[10] BPA accomplished this by eliminating the availability of the rate to California customers. The statutes governing BPA distinguish between rates for regional and nonregional customers in the type of review given the rates by the Federal Energy Regulatory Commission. *Central Lincoln Peoples' Utility District v. Johnson*, 735 F.2d 1101, 1110 (9th Cir. 1984); *United States Department of Energy—Bonneville Power Administration, supra.* By limiting the rate to regional customers, BPA invokes regional rate standards of review, and effectively forecloses the FERC from reviewing the competitive context in which the rate op-

by this Court of the Ninth Circuit decision below, BPA will continue to have the ability to assert control over the price of power sold to California.

C. BPA's INTERTIE ACCESS POLICY AFFECTS CALIFORNIA LONG-TERM PLANNING AND HAS AN ADVERSE EFFECT ON INTERSTATE COMMERCE.

BPA's restrictive Intertie Access Policy does not just distort the price California pays for Pacific Northwest Power; it also adversely affects planning decisions by California and Pacific Northwest utilities and regulators. One of the primary reasons for the initial construction of the Pacific Intertie was to take advantage of seasonal load diversities between the two regions. H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin. News 3342, 3343. Because California is a summer-peaking region and the Pacific Northwest is winter-peaking, the interconnection of the two regions offered significant opportunities for the sharing of generating resources, to the economic benefit of both regions and the Nation as a whole.

The opportunities for such benefits still exist, and have led to proposals for additional interregional Intertie capacity to be constructed. Energy and Water

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erates. *United States Department of Energy—Bonneville Power Administration, supra.* BPA's modification of the SL-87 rate does not mean that BPA power will not find its way to California, but rather that such power will be sold to Pacific Northwest entities, who will then "arbitrage" it to California at market prices, protected by the price floor established by the Intertie Access Policy. *See Aluminum Company of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380, 388 n.7 (1984) (discussing arbitrage by Pacific Northwest utilities).

Development Appropriation Act, 1985, 98 Stat. 403, 416 (1984). However, before California investor-owned utilities can participate in such projects they must receive authorization from state regulators, who review the economic viability of a proposed project by weighing the proposed expenditures against the benefits likely to be obtained. Because BPA's Intertie Access Policy shifts the economic benefits of interregional transmission facilities dramatically to Pacific Northwest power suppliers, and away from potential California participants in such transmission projects, it jeopardizes the authorization by California regulators of the utilities' investment in new interregional transmission capacity. *See Public Utilities Commission of the State of California*, Decision 86-07-004, mimeo. at 62 (July 2, 1986). The consequence may be reduced commerce in the Western United States, inefficient utilization of existing generating capacity, and the planning and construction of expensive new generation that otherwise could be deferred.

It would be particularly ironic if BPA's Intertie Access Policy were to be responsible for the demise of additional interregional transmission facilities. BPA itself has acknowledged that such additional transmission would resolve many of its concerns with a market imbalance that BPA perceives between the two regions, a factor which purportedly justifies the Access Policy. *E.g.*, App. at E75-E79. However, BPA's artificial cure for the asserted market imbalance—the Intertie Access Policy—may threaten the true cure: construction of additional transmission. By artificially raising prices, BPA reduces potential savings to California and, thereby, the economic viability of the additional transmission. Thus, BPA's Policy is

likely to create and maintain market distortion, not cure it.

CONCLUSION

For the reasons stated above and in the papers submitted by the California Energy Resources Conservation and Development Commission and the California Public Utilities Commission, the petitions for writ of certiorari should be granted.

Respectfully submitted,

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